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No. 06-364

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IN THE

Supreme Court of the United States

THE DELAWARE NATION,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN OPPOSITION BY GOVERNOR EDWARD G. RENDELL

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QUESTIONS PRESENTED

1) Did the Court of Appeals properly find that Petitioner, the Delaware Nation, failed to make out the elements of an Indian Nonintercourse Act claim, thereby negating the need to determine whether the Act applies to land granted in fee to an individual Indian?

2) Did the Court of Appeals properly find that aboriginal title was extinguished by the Province of Pennsylvania?

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OPINIONS BELOW

The opinion of the District Court was entered on November 30, 2005 and is unreported. The opinion of the Court of Appeals was entered on May 4, 2006 and is reported at 446 F.3d 410. The Court of Appeals denied rehearing on June 15, 2006.

JURISDICTION

The judgment of the Court of Appeals was entered on May 4, 2006. A petition for rehearing was denied on June 15, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Governor Edward G. Rendell hereby opposes the Petition for Writ of Certiorari by the Delaware Nation to review the judgment of the United States Court of Appeals for the Third Circuit.

COUNTER-STATEMENT OF THE CASE

Petitioner, the Delaware Nation of Anadarko, Oklahoma (Petitioner or Tribe), a federally recognized Indian tribe, claims aboriginal right and fee title to 315 acres of land that have been in undisturbed, non-Indian ownership for more than 200 years. This 315-acre parcel, located in Easton, Pennsylvania, has passed through generations of non-Indian ownership and is presently owned by several businesses and numerous private homeowners, the County of Northampton and the Commonwealth of Pennsylvania.

The long-settled status of the land was abruptly called into question when on January 15, 2004, Petitioner filed a claim in the Federal District Court for the Eastern District of Pennsylvania, alleging that pursuant to a 1741 fee patent that granted 315 acres of land to Tundy Tatamy, in his individual capacity, the Tribe has title and right of possession to the parcel, which has been referred to throughout the proceedings as "Tatamy's Place." During the course of the District Court litigation, the Tribe also asserted an aboriginal land claim, claiming that the Walking Purchase of 1737 failed to extinguish Petitioner's aboriginal title to Tatamy's Place, and consequently, aboriginal title to approximately 1,200 square miles of eastern Pennsylvania.

On motion of the defendants, the District Court dismissed the complaint in its entirety. The court held that the Proprietaries of the Province of Pennsylvania validly extinguished aboriginal title to the land through the Walking

Purchase of 1737 and that the 1741 fee patent to Tatamy did not support the Tribe's statutory claim to Tatamy's Place.

The Third Circuit affirmed the District Court's decision, agreeing that the Walking Purchase of 1737 extinguished aboriginal title to Tatamy's Place and that the Tribe had waived its argument that the Proprietaries did not have sovereign powers to extinguish aboriginal title, an issue first raised in the Court of Appeals. The court additionally found that Tatamy's Place was not tribal land, and thus the Tribe's Nonintercourse Act claim failed.

A. Factual Allegations in the Complaint

Petitioner's complaint sets forth the following history in support of its claims. On March 4, 1681, King Charles II signed a charter in favor of William Penn and his heirs for land that would later become the Commonwealth of Pennsylvania. Complaint, ¶ 30. Pursuant to the 1681 Charter for the Province of Pennsylvania, King Charles granted Penn and his heirs title to the lands and conferred upon him "broad powers in selling or renting his lands." *Id.*, ¶ 31. The 1681 Charter, which remained in effect until the signing of the Declaration of Independence, provided the foundation for the Penns' authority over the Province of Pennsylvania. *Id.*, ¶ 34.

When Penn arrived in the Province, he sought to establish peaceful relations with the indigenous people, which included the Lenni Lenape—political predecessor of Petitioner—by purchasing the right of occupancy held by the tribes. *Id.*, ¶¶ 35, 37. "Penn recognized the aboriginal land claims of the Indians, and 'from the very beginning, he acquired Indian land through peaceful, voluntary exchange.'" *Id.*, ¶ 35. Penn brokered at least nine land transactions with the Lenni Lenape through treaty. *Id.*, ¶ 37.

Penn's sons continued Penn's approach of purchasing the lands of the Province. *Id.*, ¶ 38. In 1737, Thomas Penn, in his capacity as successor to William Penn as "Proprietarie" of

Pennsylvania, extinguished aboriginal title to approximately 1,200 square miles of land through a transaction called the Walking Purchase of 1737, alleged in the complaint to have been based on a forged deed and executed fraudulently. *Id.*, ¶¶ 38, 39. After the Walking Purchase, the Lenni Lenape petitioned King Charles II objecting to the manner in which the Walking Purchase was executed, but the Walking Purchase was not invalidated. *Id.*, ¶ 40.

The Tribe claims that it is the rightful owner of a 315-acre parcel of land included in the Walking Purchase, situated in the County of Northampton, Pennsylvania. *Id.*, ¶¶ 8, 53. This 315-acre parcel is called "Tatamy's Place," after Tundy Tatamy, an Indian to whom the Proprietaries granted the land in fee. *Id.*, ¶ 43. Tatamy was a messenger and interpreter for the Penn family, and was one of the first Indians in the Forks region to be baptized. *Id.*, ¶ 41. He apparently had a unique relationship with the Proprietaries. *Id.*, ¶ 42.

In 1733, Tatamy applied to the Proprietaries for a land grant for the 315-acre parcel. *Id.*, ¶ 43. Tatamy's application states simply, "Tattemy an Indian has improv'd a piece of Land of about 300 Acres on the forks of the Delaware—he is known to Wm Allen & Jere: Langhorne—he desires a Grant for the said Land." *Id.*

One year after the execution of the Walking Purchase, the Proprietaries granted Tatamy the land he requested as a gift. *Id.*, ¶ 44. Tatamy's 1738 deed was declared null and void, however—at Tatamy's request—in a 1741 patent. *Id.*, ¶ 41; *Id.* Exhibit F. The 1741 patent indicates that, rather than rely on the 1738 gift, Tatamy apparently determined to pay 48 pounds, 16 shillings and 5 pence for the land. *Id.* Exhibit F. Tatamy died in 1761. *Id.*, ¶ 45.

Northampton County records attached to the complaint indicate that Edward Shipper, Executor of the Estate of William Allen, conveyed Tatamy's Place to Henry and Mathias Strecher in 1760. *Id.* Exhibit G. The deed was

recorded in the Office of the Recorder of Deeds of Northampton County on March 12, 1802, and the deed states that evidence of a writing memorializing the conveyance was proved in court.[1] *Id.*

Tatamy's Place has been in non-Indian ownership for more than 200 years.

B. Proceedings Below

The District Court dismissed Petitioner's complaint in its entirety. In rejecting Petitioner's aboriginal land claim, the court explained that the sovereign had the power to extinguish aboriginal title as a matter of law, *see* Pet. App. C 35a, and could extinguish aboriginal title at will, *see* Pet. App. C 36a. After noting that "Plaintiff does not contest that Thomas Penn and the other Proprietors at the time maintained sovereign authority to extinguish aboriginal title," Pet. App. C 38a, the court found that "sweeping authority" allowed Thomas Penn to extinguish aboriginal title by whatever means, and that the Walking Purchase of 1737 established Penn's requisite intent to terminate Petitioner's aboriginal title to the land involved, which includes Tatamy's Place. Pet. App. C 39a-40a. The District Court also rejected Petitioner's claim under the Nonintercourse Act of 1799, 25 U.S.C. § 177, because aboriginal title to Tatamy's Place had been terminated by the Walking Purchase. Pet. App. C 42a-43a.

The Third Circuit affirmed the District Court's dismissal, also rejecting Petitioner's aboriginal and Nonintercourse Act claims. The court first rejected Petitioner's new argument on appeal—i.e., that Thomas Penn was not sovereign with authority to extinguish aboriginal title—explaining that

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[1] Although the court below identified the recordation of the deed as 1803, the document itself indicates that the deed was recorded in 1802. The dates are not relevant to the disposition of the issues before the Court.

absent "exceptional circumstances," the Third Circuit would not consider issues raised for the first time on appeal. The court then held that the District Court correctly determined that even had the Walking Purchase been executed fraudulently, "'[p]roof of fraud is not a material fact that would nullify Proprietory Thomas Penn's extinguishing act.'" Pet. App. A 11a-12a (citing *The Delaware Nation*, 2004 U.S. Dist. Lexis 24178, *28). The court also found that Petitioner's Nonintercourse Act claim failed, because the land had been granted in fee to Tatamy in his individual capacity, not as an agent of the Tribe, and thus the land was not tribal land, an essential element of a Nonintercourse Act claim. Pet. App. A 14a.

Neither court relied on the additional grounds argued by defendants for dismissing the claims, including Petitioner's failure to allege an unlawful conveyance, extinguishment of title by the Treaty of Greeneville of August 3, 1795, 7 Stat. 49 (1795), and laches.

REASONS FOR DENYING THE PETITION

This case raises the narrow issue of whether Petitioner has any claim to a 315-acre parcel of land located in Easton, Pennsylvania. After fully considering the arguments presented, the court below determined that Petitioner did not have such a claim for the unremarkable reason that Petitioner failed adequately to allege that that Tatamy's Place was tribal land, a required element of an Indian Nonintercourse Act violation. Both courts also determined that Petitioner's aboriginal title to the land was long ago extinguished, via the Walking Purchase of 1737.

The questions presented in the petition are both irrelevant to the ultimate outcome and inconsequential beyond the scope of this case. Petitioner asks this Court to consider whether the Nonintercourse Act applies to fee lands held by a tribe even though Petitioner is unable to establish that the land was

tribal and could not prevail regardless of the scope of the Act's application. Petitioner additionally asks this Court to consider whether it was appropriate for the Third Circuit to find waived an argument never raised by Petitioner before the District Court. Even if the Court determined that the question of waiver warranted its attention, Petitioner's argument—that the Provincial government of Pennsylvania was not sovereign and therefore was without authority to extinguish aboriginal title—is not open to reasonable debate. Were it so, title to virtually all land in Pennsylvania, and indeed to land in all other states for which similar colonial charters were executed, would be called into question.

The Third Circuit's decision in this case raises no conflict with any court of appeals or state court of last resort. Nor would this Court's resolution of the questions Petitioner presents have any bearing on Petitioner's lack of rights to the 315-acre parcel. The issues raised—the scope of the Nonintercourse Act and waiver—are not issues of sufficient importance to warrant Supreme Court review. Further review, however, would exacerbate the disruption Petitioner's claims have had on the rightful property owners of Tatamy's Place. Certiorari should be denied.

A. This Case Does Not Require Resolution of Whether the Nonintercourse Act Protects Indian Lands Held in Fee

The question of whether the Nonintercourse Act of 1799, 25 U.S.C. § 177, applies to Indian fee lands—the Petitioner's first question presented for this Court's review—was not decided by the courts below and would not be dispositive of the claims in this case. After reviewing the grants of land by the Provincial government to Tatamy, the Third Circuit determined that because Petitioner could not establish that Tatamy's Place was tribal land, a required element of a

Nonintercourse Act claim,[2] it was unnecessary to consider the scope of the Act's applicability:

> Even assuming that the Nonintercourse Act applies to land reacquired by an Indian tribe in fee after the sovereign extinguished aboriginal rights to land—an issue which appears to be unsettled, *but which is not necessary for us to decide here*—the Delaware Nation's claim must fail because it is clear that the Proprietors granted Tatamy's Place to Chief Tatamy in his individual capacity, and not as an agent of the tribe.

Pet. App. 13a-14a (emphasis added).

In failing to meet the elements of a Nonintercourse Act claim, Petitioner cannot prevail, regardless of the Court's answer to Petitioner's first question. Review of Petitioner's question would thus be hypothetical only, and would have no bearing on the Court of Appeals' decision. This Court's consideration of the issue is unwarranted.

1. *The Court of Appeals Correctly Determined that Tatamy's Place Is Not Tribal Land, a Necessary Element of a Nonintercourse Act Claim*

What Petitioner is really trying to challenge is the Third Circuit's determination that Tatamy's Place "is not 'tribal' in any sense of that word." Pet. App. 17a. However, not only has Petitioner *not* sought review of this question, but the Third Circuit's conclusion that Tatamy's Place is not tribal land is clearly correct.

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[2] To establish a *prima facie* case for violation of a Nonintercourse Act claim, a tribe must allege that: 1) it is an Indian nation or tribe, 2) the land at issue was tribal land at the time of the alleged sale to a non-Indian, 3) the United States never approved the sale of the tribal land, and 4) the trust relationship between the United States and the Indian tribe has not been terminated or abandoned. *See, e.g., Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994).

The plain language of Tatamy's 1741 Patent conveys the land to Tatamy and his heirs only, and can in no way be reasonably interpreted as a grant to the Lenni Lenape.[3] The 1741 Patent provides:

> at the Instance and request of *the said Tundy Tatamy* in consideration of his Surrendering and delivering up to be Cancelled the said former patent of the said Premises & of the Sum of Forty Eight Pounds Sixteen shillings and five Pence lawfull Money of Pennsylvania to our use *paid by the said Tundy Tatamy* . . . . We have given granted released & confirmed and by these presents for us our Heirs and Successors do grant release and *confirm unto the said Tundy Tatamy and his Heirs* the said Three hundred and fifteen Acres of Land as the same now set forth . . . .

Complaint, Exhibit F (emphasis added). The 1741 Patent indicates that the purpose of the land grant was "for Settlement and Place of Abode for [Tatamy] and his children under certain Quit rent and other reservations, Conditions and Limitations." Complaint, Exhibit F. Petitioner's complaint in fact acknowledges that the 1741 Patent granted land to Tatamy in fee. *See* Complaint, ¶ 45 ("Chief Tatamy's fee simple ownership of Tatamy's Place is documented and indisputable.") The 1741 Patent simply says nothing to suggest that the grant was to the Lenni Lenape or to Tatamy as a representative of the Tribe. On its terms, it was a grant to Tatamy, and Tatamy only. *See Felker v. Stuart Guaranty Co.*, 1998 U.S. Dist. LEXIS 17937 at *8-9 (M.D. Pa. Mar. 30, 1998) ("[T]he interpretation of a deed depends not on 'what the parties may have intended by the language but what is the meaning of the words' [used].")

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[3] Although Petitioner appears to rely in part on a 1738 patent to Tatamy for the same parcel of land, *see* Pet. at 6, the 1741 Patent expressly canceled the 1738 Patent. *See* Complaint, Exhibit F.

Despite the unambiguous language of the patent, Petitioner has persisted in arguing that the land is tribal land because the Lenni Lenape did not recognize the concept of individual ownership of land. This argument is misplaced, and the Third Circuit rightly dismissed it, explaining that "[t]he subjective state of mind of the grantee is not a consideration in interpreting public land grants." Pet. App. 16a. The court noted that, "[i]n interpreting grants of land by the government, intent of the government is a prominent consideration, and the language of the grants is to be strictly construed." Pet. App. 15a.[4]

The Third Circuit's conclusion regarding the applicability of the proprietary government's laws is completely in accord with this Court's precedent. More than 180 years ago, this Court explained that, "as grantees from the *Indians*, [non-Indians] must take according to *their* [Indian] laws of property, and as Indian subjects. The law of every dominion affects all persons and property situate within it . . . ." *Johnson v. M'Intosh*, 21 U.S. 543, 568 (1823) (emphasis in original). Conversely, as a colonial subject, Tatamy took according to the laws of the proprietary government. Petitioner's contrary interpretation does not alter the applicable law. Tatamy's Place was not tribal land. Petitioner has no rights to the land through Tatamy, and no claim under the Nonintercourse Act.

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[4] After finding the language of the 1741 Patent unambiguous, and that no resort to other sources was necessary, the Third Circuit acknowledged the minutes from a meeting of the Provincial Council in 1742, which "explicitly confirm that the Proprietors intended the land to go to Chief Tatamy alone, and not 'any other of the Delaware Indians.'" Pet. App. 15a. Whatever the merits may be of the claim that the Tribe's practice of treating aboriginal lands as held in common for Indians, that practice cannot control construction of a land patent granted by the colonial government to an individual Indian.

2. *Petitioner Failed to Allege a Conveyance, Another Critical Element of a Nonintercourse Act Claim*

The Third Circuit could have readily affirmed the District Court's decision on the basis of Petitioner's failure to allege an unlawful conveyance that is required for a Nonintercourse Act claim, as in fact Judge Roth was inclined to do.[5] A conveyance of land from an Indian to a non-Indian after the passage of the Act is an essential element of a Nonintercourse Act claim.

In fact, the only transaction Petitioner cites is the 1802 recordation of the 1800 deed that conveys Tatamy's Place from Edward Shipper, the executor of the estate of William Allen, to Henry and Mathias Strecher *in 1760*, 30 years before the enactment of the Nonintercourse Act. Complaint, ¶ 46. Further, the 1802 document Petitioner attached to its complaint indicates that the written instrument used for the 1760 conveyance "has been proved in open Court." Complaint, Exhibit G. By necessity, Tatamy was dispossessed of the land decades before the Act was passed. Thus, for almost five decades after Tatamy obtained the 1741 Patent, no Nonintercourse Act violation was even possible, and Tatamy's Place could have been legally transferred in any variety of ways.

The elements of a Nonintercourse Act claim cannot be satisfied in the absence of a conveyance, and in any case, the conveyance in this case occurred prior to the passage of the Act. Petitioner's Nonintercourse Act claim fails for this reason, as well.

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[5] The Court of Appeals noted that "Judge Roth would hold that the Nonintercourse Act claim would fail even had the land in question been tribal because the Delaware Nation failed to identify a specific land conveyance that violated the Act or to allege that the gap in the chain of title post-dates the Nonintercourse Act's enactment." Pet. App. A 17a n.15.

B. The Court Properly Determined that Petitioner Waived Its Right to Challenge the Sovereignty of Thomas Penn, But in Any Case, The Argument Has No Merit

Petitioner's second question presented—"[w]hether the Court of Appeals' finding of waiver as to Petitioner's aboriginal rights claim was improper"—likewise does not accurately characterize the question Petitioner asks this Court to address and does not warrant this Court's attention. In fact, the issue is not whether the Court of Appeals' finding of waiver with respect to Petitioner's aboriginal rights claim was improper, but rather whether its finding of waiver with respect to the issue of the Penns' *sovereignty* was improper in light of Petitioner's failure to raise the argument before the District Court.

The question of waiver, however, is commonplace, and the Third Circuit's application of the doctrine was straightforward in this case. Although Petitioner vigorously contested the efficacy of the Walking Purchase of 1737 on the ground that it was fraudulent, Petitioner did not question Thomas Penn's sovereignty or power to extinguish aboriginal title in the District Court. A finding of waiver is completely proper in such circumstances. Further, even if Petitioner had not waived the sovereignty argument, its argument would nonetheless fail. That the Proprietary governments were sovereign with the power to extinguish aboriginal title is not open to debate. A contrary decision would undermine title to most of the eastern United States.

1. *The Proprietaries of Pennsylvania Extinguished Aboriginal Title to Tatamy's Place in 1737*

The Third Circuit correctly determined that the Walking Purchase of 1737 validly extinguished aboriginal title. *See* Pet. App. 11a. The sovereign unquestionably has absolute

power to extinguish aboriginal title. *See County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226, 234 (1985). The means by which the sovereign extinguishes such title cannot be questioned. As this Court put it, "whether [the extinguishment] be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts." *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941). Further, whether achieved through fraud or by other means, extinguishment occurs when the government's intent to revoke the occupancy rights of a tribe is clear. *See United States v. Gemmill*, 535 F.2d 1145, 1148 (9th Cir. 1976). Petitioner's complaint clearly evidences the intent of the Proprietaries to extinguish aboriginal title through the Walking Purchase. As the Third Circuit concluded, "[t]o now argue that Thomas Penn did not intend to extinguish aboriginal title to Tatamy's Place, which is indisputably land covered by the Walking Purchase, contradicts the very allegations in the Complaint." Pet. App. 12a-13a.

2. *The Court of Appeals Properly Determined that Petitioner Waived its Right to Raise the Argument on Appeal*

The question whether a party waived an argument is a routine issue warranting no attention by this Court. "It is well established that failure to raise an issue in the district court constitutes a waiver of the argument" on appeal. *Brenner v. Local 514, United Bhd. of Carpenters & Joiners of Am.*, 927 F.2d 1283, 1298 (3d Cir. 1991) (citations omitted).

In light of this standard, the Third Circuit's conclusion was plainly correct. As the court explained, the closest Petitioner came to raising the issue before the District Court is paragraph 31 of the complaint, which states that the Penns were "accountable directly to the King of England." Pet. App. A 10a. This paragraph, the court concluded, "fails to

put the District Court or the defendants on notice of the Delaware Nation's purported argument on appeal—that Thomas Penn lacked the sovereign authority or consent from the King of England to extinguish aboriginal title in Pennsylvania." Pet. App. A 10a.

A review of the briefs and the district court's decision supports the Third Circuit's conclusion. For example, Governor Rendell noted in his reply in the District Court that the Walking Purchase was valid *because* Thomas Penn was sovereign. As the Governor stated in footnote 1:

> The Penns' status as sovereign, with the power to extinguish aboriginal title, *is of course undisputed. See* Compl. at ¶¶ 28-37; opp. at 5-6.

Governor's Reply, p. 4 n.1 (emphasis added). Petitioner did not challenge, or even acknowledge, this statement in its Sur-Reply.[6] Had Petitioner intended to challenge Penn's sovereignty, it surely would have addressed the Governor's statement. Further, Petitioner's complaint alleges nine treaties between the Penns and the Tribe, by which Proprietaries extinguished Indian title to land in Pennsylvania. *See* Compl. ¶ 37. In not questioning the validity of those treaties, Petitioner clearly implied, at the least, that the treaties were valid. Indeed, the District Court also concluded that "Plain-

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[6] Petitioner now alleges that Governor Rendell "*raised Thomas Penn's alleged sovereign status as a factual issue, not a legal issue.*" Pet. 20 (emphasis in original). Governor Rendell did not raise Penn's sovereign status as an issue, but instead noted that no dispute existed on this topic. In addition, it is difficult to fathom how the question of whether Thomas Penn was sovereign, with authority to extinguish aboriginal title, can properly be characterized as a "factual" question. Whether Penn was sovereign, if open to debate at all, requires resort to the terms of the 1681 Charter for the Province of Pennsylvania from King Charles II to William Penn. Because the sovereign status of the Penns is based on the Charter by which King Charles II conveyed authority to William Penn and his heirs, the inquiry is clearly a legal, not factual one.

tiff does not contest that Thomas Penn and the other Proprietors of the time maintained sovereign authority to extinguish aboriginal title," Pet. App. C. 38a, and that the "Delaware Nation admits that Thomas Penn, together with other Proprietors, had sovereign authority to take the land that encompassed Tatamy's Place through the Walking Purchase . . ." Pet. App. C 34a. The Court of Appeals properly concluded that Petitioner did not challenge Penn's sovereignty until the case was on appeal, thereby waiving the argument.

Petitioner now argues that even if it waived the argument, it should nonetheless have been allowed to present the argument before the Third Circuit because prohibiting it from doing so contravenes federal Indian law and policy. Petitioner maintains that it pled that William Penn received fee title, but not the right of extinguishment. Pet. 22. This claim was not addressed by any party, or by either court below. Nor does Petitioner cite to anything in the papers below to support that it previously raised this new position.

In fact, the authorities that Petitioner cites do not support its new argument. Petitioner cites to the Indian Protection Act, 25 U.S.C. § 194, apparently as evidence of a federal policy that overcomes waiver in Indian land litigation cases. Pet. 20-21. But the Indian Protection Act does not give a tribe a free pass to raise any new argument it pleases on appeal, and no case supports such a position. The purpose of the Indian Protection Act instead is quite specific—i.e., it shifts the burden of proof in cases involving property to a non-Indian whenever an Indian makes out a presumption of title. *See* 25 U.S.C. § 194 ("[T]he burden of proof shall rest upon the white person whenever the Indian shall make out a presumption of title in himself . . . ."). It provides no direction to a federal court to disregard judicial doctrines that apply to all litigants when one litigant happens to be an Indian tribe.

In fact, none of Petitioner's arguments supports the position that a judicial determination that an argument is waived contravenes federal Indian law or policy. Petitioner seems to suggest that simply because Indian interests are involved, this Court should discard basic judicial doctrines. *See* Pet. 24. No case supports such an approach, and Petitioner cites to none. The Third Circuit's determination that Petitioner waived its challenge to Penn's sovereign status was proper.

3. *Penn's Status as Sovereign, with Authority to Extinguish Aboriginal Title, Is Not Open to Debate*

Even if it was not appropriate for the Third Circuit to have found Petitioner's sovereignty argument waived, Petitioner would nonetheless lose on the merits. There is no reasonable question that William Penn and his heirs were sovereign, with authority to terminate aboriginal title during the Colonial period. Were this not the case, title to all land acquired by William or Thomas or any other Penn—millions of acres—would be undermined. Further, because King Charles' Charter to Penn was virtually the same as other charters, the logical result of Petitioner's argument is that title to most of the eastern United States is vulnerable. Case law simply does not support Petitioner's extraordinary position.

During the colonial period, the power to extinguish aboriginal title resided in the King *or in colonial governments*, pursuant to their chartered powers. As stated by Chief Justice Marshall, "[t]he power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, *or its grantees*. The validity of the titles given by either has never been questioned in our Courts." *Johnson v. M'Intosh*, 21 U.S. 543, 587-88 (1823) (emphasis added); *see also Martin v. Waddell*, 41 U.S. 367, 412 (1842) (explaining that the patent enabling the Duke of

York to establish a colony permitted the "duke, his heirs and assigns, [] to stand in place of the king, and administer the government according to the principles of the British constitution").

That the Charter for the Province of Pennsylvania of 1681 granted to William Penn and his heirs full authority to extinguish aboriginal title is clear:

> [W]ee have given and granted, and by these presents, for us, our heires and Successors, do Give and Grant unto the said William Penn, his Heirs and Assigns, *full and absolute power, licence and authoritie*, that he, the said William Penn, his heires and assignee, from time to time hereafter forever, att his or theire own Will and pleasure may assigne, alien, Grant, demise, or enfeoffe of the Premises soe many and such parses or parcells to him or them that shall be willing to purchase the samej as they shall thinke fitt . . . .

Complaint, Exhibit A (emphasis added). Petitioner acknowledged in its complaint that the Charter granted the Proprietaries broad authority—"full and absolute power, licence and authoritie"—to grant land within the boundaries established under the Charter. Complaint ¶ 31.

This Court has consistently found that the colonial charters empowered the proprietary governments to convey land. As this Court stated:

> The title of the crown (as representing the nation) passed to the colonists by charters which were absolute grants of the soil; and it was a first principle in colonial law, that all titles must be derived from the crown. It is true that, in some cases, purchases were made by the colonies from the Indians; but this was merely a measure of policy to prevent hostilities; and William Penn's purchase, which was the most remarkable transaction of

> this kind, was not deemed to add to the strength of his title.

Johnson, 21 U.S. at 570. *See also Howard v. Ingersoll*, 54 U.S. 381, 400 (1852) ("In proprietary governments the right of soil as well as jurisdiction was vested in the proprietors."); *Martin v. Waddell*, 41 U.S. at 412 (explaining that the charter to the Duke of York enabled him to govern according to English laws "in which the duke, his heirs and assigns, were to stand in the place of the king . . .").

The Third Circuit was correct in finding that Petitioner waived its right to contest the authority of the Penns to extinguish aboriginal title, an argument not raised in the District Court and not sufficient to resuscitate Petitioner's claims. This Court's review is unwarranted.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Delaware Nation's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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